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IN THE SUPREME COURT OF THE

UNITED STATES

TERM, 1980

NO. 79-6190

TIMOTHY DALE CRAWFORD,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

I.

WHETHER THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES UNDERMINES THE PROOF BEYOND A REASONABLE DOUBT STANDARD OR JEOPARDIZES THE RELIABILITY OF THE FACT-FINDING PROCESS IN A CAPITAL CASE TRIED UNDER ALABAMA'S STATUTE.

II.

WHETHER THIS COURT HAS HELD THAT THE PRECLUSION OF LESSER INCLUDED OFFENSES IS UNCONSTITUTIONAL.

III.

WHETHER THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S CAPITAL PUNISHMENT STATUTE VIOLATES THE DUE PROCESS CLAUSE.

IV.

WHETHER THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE.

V.

WHETHER THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S STATUTE VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

VI.

WHETHER THE PRECLUSION OF LESSER INCLUDED OFFENSES WAS UNCONSTITUTIONAL IN THIS PARTICULAR CASE BECAUSE THERE WAS NO EVIDENTIARY BASIS FOR THEM.

VII.

WHETHER ALABAMA'S PROCEDURE OF DEFERRING THE TRIAL JUDGE'S CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL THE JURY HAS IMPOSED THE DEATH SENTENCE IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

VIII.

WHETHER SUFFICIENT AGGRAVATING CIRCUMSTANCES WERE PRESENT TO SUPPORT PETITIONER'S DEATH SENTENCE.

IX.

WHETHER MASSIAH V. UNITED STATES APPLIES TO FRESH CRIMINAL CONDUCT ENGAGED IN BY DEFENDANT AFTER INDICTMENT.

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BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming the petitioner's conviction and sentence is reported as Crawford v. State, Ala. Cr. App., 377 So.2d 145 (1979). The opinion of the Supreme Court of Alabama affirming the conviction and sentence and the denial of rehearing is reported at 377 So.2d 159 (1979).

JURISDICTION

The petitioner invokes jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

Statutes

Code of Alabama 1975, §13-11-2
Code of Alabama 1975, §13-11-2(a)(10)
Code of Alabama 1975, §13-11-2(c)
Code of Alabama 1975, §13-11-3
Code of Alabama 1975, §13-11-4
Code of Alabama 1975, §13-11-6
Code of Alabama 1975, §13-11-7

STATEMENT OF THE CASE

The Petitioner, Timothy Dale Crawford, was indicted and tried under Code of Alabama 1975, §13-11-2(a)(10), which provides:

> If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses: Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts.

Petitioner's trial commenced on July 24, 1978. At the close of evidence the trial court instructed the jury that petitioner was charged with the capital offense of murder in the first degree wherein two or more human beings are intentionally killed by one or a series of acts. The court then went into a lengthy explanation of the elements of first degree murder and further instructed the jury that it must find petitioner guilty of first degree murder against all three victims.

The jury was also charged that if petitioner was found guilty, his punishment would be fixed at death.

At the conclusion of deliberation, the jury returned a guilty verdict and fixed petitioner's sentence at death.

At that point a sentencing hearing was scheduled for September 1, 1978. At the hearing petitioner presented as mitigating circumstances the facts that he was twenty-two years old, had no prior criminal record, was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

As aggravating circumstances the court found that

petitioner knowingly created a great risk of death to many persons, the capital felony was committed for pecuniary gain and the capital felony was especially heinous, atrocious or cruel.

SUMMARY OF ARGUMENT

The preclusion of lesser included non-capital offenses by Alabama's capital punishment statute serves to promote rational and consistent sentencing in capital cases by removing an historically proven source of de facto discretion. While the risk or level of arbitrariness and capriciousness in capital sentencing can be reduced to a constitutionally tolerable amount without preclusion, the reduction of it even further than the Constitution requires is a legitimate state purpose. Preclusion is especially important under Alabama's statute because the state has chosen to pursue the advantages of judicial sentencing to the utmost and thereby maximize rationality and consistency in sentencing while at the same time seeking to ensure the reliability of fact-finding by requiring that juries make specific reference to the penalty of death in any verdict convicting a defendant of a capital offense.

Preclusion does not undermine the proof beyond a reasonable doubt standard or jeopardize the reliability of fact-finding in cases tried under Alabama's statute. Petitioner's assumption that juries cannot be trusted to follow their instructions and acquit capital defendants who are only guilty of non-capital offenses but instead will disobey their oaths and instructions and wrongfully convict defendants of capital offenses for which they are not guilty is not proven by statistics showing a high conviction rate under Alabama's statute. The lesser

included offense doctrine originated to protect prosecutors from suffering acquittals when they fail to prove some element of the higher offense charged, Keeble v. United States, 412 U.S. 205, 208 (1973), and the conviction statistics reflect that prosecutors have responded to the non-availability of that protection by prosecuting only the strongest capital cases as capital cases.

Petitioner's speculative assumption that preclusion will cause juries to act lawlessly and wrongfully convict defendants of capital offenses should be rejected for three reasons. First, it casts doubt upon the basic integrity of our jury system which is premised upon juries following their instructions. Second, it is contradicted by the historical evidence which shows that juries have always been more cautious, more compassionate, and far more relunctant to convict in capital cases than in non-capital cases. Juries are meticulous in their regard for the rights of capital defendants, and if they do disobey their oaths and instructions it is to favor those defendants. This historical evidence has been cited and the predictability of juries' different behavior in capital cases relied upon in cases such as Woodson v. North Carolina, 428 U.S. 280, 289-296, 302-303 (1976)(plurality opinion). Accord, Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring); id. at 388, 402 (Burger, C. J., dissenting); see e.g., Witherspoon v. Illinois, 391 U.S. 510, 519-520 (1968) (juries "express the conscience of the community"); Gregg v. Georgia, 428 U.S. 153, 181 (1976) (joint opinion) (juries reliably reflect society's values and evolving standards of decency).

The third reason petitioner's speculative assumption should be rejected is that it ignores safeguards built into Alabama's statute to ensure that a defendant is not wrongfully convicted of a capital offense. The first is

the requirement that any verdict convicting a defendant of a capital offense "fix the penalty at death," even though the jury is not the sentencing authority. This requirement ensures that the awesome nature of the jury's task in deciding guilt and the terrible responsibility it assumes in convicting a defendant of a capital offense will be impressed upon each juror. It thereby serves to reinforce the proof beyond a reasonable doubt standard by calling upon the historical reluctance of jurors to convict in cases in which death is the result. The second statutory safeguard is the mistrial and re-indictment clause which provides that if the jury is unable to agree on a verdict of guilty or not guilty or on the fixing of the penalty at death in the verdict a mistrial is declared and the defendant can thereafter be re-indicted for a non-capital offense. The availability of the mistrial option and the possibility of re-indictment means that the jury is not forced to choose between acquitting a defendant who is guilty of a serious non-capital offense and wrongfully convicting him of a capital offense for which he is not guilty.

The third statutory safeguard is the sentencing function performed by the trial judge who weighs aggravating and mitigating circumstances in deciding the sentence of a convicted capital defendant. The trial judge is not bound by a fact-finding implicit in a guilty verdict, and can consider as a non-statutory mitigating circumstance the quantum of evidence. The reliability of sentencing decisions is further safeguarded by appellate review.

Keeble v. United States, 412 U.S. 205 (1973), was decided on the basis of statutory interpretation and did not hold that preclusion of lesser included offenses violated due process. The only constitutional holding in Keeble was the implicit holding of the dissent that preclusion was constitutionally permissible. The observations of the Keeble majority about the possibility that preclusion might cause a jury to convict a defendant of a higher offense than he was guilty of are not applicable to cases tried under Alabama's capital punishment statute because juries behave predictably different in capital cases, and because Alabama's statute has special safeguards that reinforce the reasonable doubt requirement and further ensure the reliability of fact-finding.

The fact that lesser included offenses have historically been available and that Alabama is the only jurisdiction which precludes lesser included non-capital offenses does not mean that preclusion is unconstitutional. Johnson v. Louisiana, 406 U.S. 356 (1972), held that due process did not require jury unanimity despite the fact that the unanimous jury, which originated as early as the 14th century is embedded in our legal history, and upheld Louisiana's 9 and 3 rule even though no other state had one like it. Williams v. Florida, 399 U.S. 78 (1970), held that states were not required to use twelve-member juries even though that had been the fixed number for five hundred years, even though earlier decisions had assumed that number was constitutionally required, and even though the federal courts and virtually all the states used that number. In accord with these principles is Leland v. Oregon, 343 U.S. 790 (1972), the continuing validity of which was noted in Patterson v. New York, 432 U.S. 197, 204-205 (1977).

The availability of lesser included offenses is not a right guaranteed either explicitly or implicitly by the Constitution, and preclusion does not infringe upon

the right to proof beyond a reasonable doubt or the right to reliable fact-finding.

Preclusion does not violate the Eighth Amendment. It does not prevent individualized sentencing or undermine the reliability of the sentencing process. Under Alabama's statute, the trial judge holds a sentencing hearing to determine the particular circumstances concerning the offense and the offender. At the hearing evidence may be presented on any matter relevant to sentencing, and the judge is free to consider non-statutory mitigating circumstances. In making the sentence findings, the judge is not bound by any fact-finding contained in the jury's verdict. The trial judge determines the sentence based upon a weighing of the aggravating and mitigating circumstances that the judge has determined to exist, and if the judge sentences a defendant to death the evidence of aggravating and mitigating circumstances is reviewed and reweighed at the appellate level.

Neither preclusion nor any other factor has caused an improperly high percentage of capital defendants to be sentenced to death in Alabama. The sentencing statistics reflect the fact that Alabama's statute has limited capital offenses to a narrowly defined group which are most deserving of the death penalty, evidence that arbitrariness and capriciousness in sentencing have been reduced accordingly, and indicate that exactly what Mr. Justice White predicted in Gregg v. Georgia, 428 U.S. 153, 222 (1976) (concurring opinion), should occur has occurred.

The singularity of Alabama's procedure in precluding lesser included non-capital offenses does not indicate a violation of the Eighth Amendment. The purpose of the Cruel and Unusual Punishments Clause is not to compel uniformity of trial procedure, and each capital statute

upheld by this Court contains at least one unusual or unique procedure. Gregg v. Georgia, 428 U.S. 153, 195 (1976) (joint opinion), held that no particular system of procedures was required in capital cases and that each distinct system must be examined on an individual basis.

Moreover, the preclusion of lesser included offenses was not unconstitutional in this particular case because there was no evidentiary basis for them.

Alabama's procedure of deferring the trial judge's consideration of aggravating and mitigating circumstances until the jury has imposed the death sentence is not violative of the Eighth and Fourteenth Amendments.

In the case at hand there were sufficient aggravating circumstances to support petitioner's death sentence.

Massiah v. United States, does not apply to fresh criminal conduct engaged in by a defendant after indictment.

Finally, petitioner's confession was knowingly, voluntarily and intelligently made.

ARGUMENT

I.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES DOES NOT UNDERMINE THE PROOF BEYOND A REASONABLE DOUBT STANDARD OR JEOPARDIZE THE RELIABILITY OF THE FACT-FINDING PROCESS IN A CAPITAL CASE TRIED UNDER ALABAMA'S STATUTE.

Central to virtually all of the petitioner's arguments is the assumption that the preclusion of lesser included non-capital offenses in a capital case undermines the proof beyond a reasonable doubt standard and

jeopardizes the reliability of the fact-finding process. Petitioner's assumption is based on speculation that if the evidence proves a defendant guilty of a non-capital offense but not of the capital offense with which he is charged, the jury might wrongfully convict the defendant of the capital crime rather than acquit him. Not only is petitioner's assumption based upon speculation, but the historical evidence of jury behavior in capital cases, this Court's reliance on that behavior in the past, and the special safeguards contained in Alabama's statute all establish that petitioner's assumption is unwarranted.

A. The Historical Evidence Concerning Jurors' Attitudes and Behavior in Capital Cases Establishes that Jurors in Such Cases are Reluctant to Convict and Do Resolve All Doubt in Favor of Capital Defendants, and this Court has Relied Upon the Predictability of that Behavior Before.

As Mr. Justice Brennan noted in Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring), "Juries, of course, have always treated death cases differently..." Juries have always been more cautious, more compassionate, and far more reluctant to convict in capital cases than in non-capital cases. Mackey, The Inutility of Mandatory Capital Punishment: An Historical Note, 54 B.U.L. Rev. 32 (1974), collects nineteenth century documentation of the willingness of jurors to seize upon any doubt, however specious or irrational, as an excuse to acquit a defendant rather than convict him of an offense where the penalty is death. Representative of that documentation is the report of a committee of the New York Assembly in 1841 which urged abolition of capital punishment because:

> "The uncertainty of conviction, by juries, for capital offenses, has grown almost into a proverb. There can be no criminal lawyer in this State, of any extended practice or observation, by whom this remark will not be received as a truism... Juries are always, and will always be powerfully swayed in their judgment, as well as in their feelings, by that horror of shedding the blood of their fellow-man which the laws of God have planted too deeply in the hearts of all to be eradicated, however it may be weakened, by the influence of any laws of man. In the clearest cases, it is constantly seen they will not convict... It is vain to talk of the juror's oath. They will violate them, by what their consciences regard as only pious perjuries, under a thousand pleas of technical deficiencies or imperfections of evidence, however immaterial in their nature."

Accord, Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (plurality opinion) ("At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.")

Indeed, the great reluctance of jurors to convict in any case in which capital punishment is the penalty has served as the motivating factor behind most of the legislative developments in this area of the law. These developments are traced in Woodson v. North Carolina, 428 U.S. at 289-296 (1976) (plurality opinion). In the beginning, death was the exclusive and mandatory sentence for capital offenses which were broadly defined to include a wide range of crimes. 428 U.S. at 289. Jurors reacted unfavorably to the harshness of mandatory death sentences, and refused to convict a significant number of palpably guilty defendants. 428 U.S. at 289, 293 (plurality opinion); id. at 311 (Rehnquist, J., dissenting); Mackey, supra. The States initially responded to this problem of jury nullification by limiting the classes of capital offenses, but jurors still frequently refused to convict

even murderers rather than subject them to automatic death sentences. Woodson v. North Carolina, 428 U.S. at 290 (plurality opinion). The next legislative response was to divide murder into degrees, thereby creating lesser included offenses, with death being the punishment only for murder in the first degree. Id.; Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333 n. 8 (1976) (plurality opinion). After the division of murder into degrees, juries continued to find the death penalty inappropriate in a significant number of first degree murder cases and as a result returned verdicts for a lesser degree of murder even when the defendants were clearly guilty of murder in the first degree. Woodson v. North Carolina, 428 U.S. at 291, 293 & n. 29, 302 (plurality opinion); McGautha v. California, 402 U.S. 183, 199 (1971).

Finally, because of the lack of success in attempting to prevent jury nullification under any type of mandatory statute, legislators gave in and decided to legitimize the effects of jury nullification by enacting discretionary sentencing statutes. Woodson v. North Carolina, 428 U.S. at 291-293 (plurality opinion); McGautha v. California, 402 U.S. at 199. Jurors' reluctance about the death penalty and compassion for capital defendants had a pronounced effect upon sentencing under discretionary statutes. The result was that jurors operating under discretionary statutes returned death sentences in only a minority of first degree murder cases. Woodson v. North Carolina, 428 U.S. at 295 & n. 31, 302 (plurality opinion); Furman v. Georgia, 408 U.S. 238, 299 (Brennan, J., concurring). As Mr. Chief Justice Burger has noted, "juries have been increasingly meticulous in their imposition of the [death] penalty" and "[t]he very infrequency of death penalties imposed by jurors attests their cautious and

discriminating reservation of the penalty for the most extreme cases." Furman v. Georgia, 408 U.S. at 388, 402 (Burger, C. J., dissenting).

The historical record rebuts petitioner's speculation that jurors will callously disregard their oaths and disobey their instructions in order to wrongfully convict a defendant of a capital crime. Instead, history shows that jurors are meticulous in their regard for the rights of capital defendants, extremely reluctant to convict when death is the penalty, and if they do disobey their oaths and instructions it is to favor the defendant.

This Court has relied in past cases upon the predictable compassion of jurors for the rights of capital defendants. The decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), was based upon the observation that jurors "express the conscience of the community on the ultimate question of life or death." Id. at 519-520 (footnote omitted); accord, Furman v. Georgia, 408 U.S. at 299 (Brennan, J., concurring). Indeed, a majority of this Court has recognized that the action of juries in capital cases is a reliable reflection of contemporary values and of the prevailing standards of decency in our society. Coker v. Georgia, 433 U.S. 584, 596-597 (1977) (plurality opinion of White, J., joined by Stewart, Blackmun, and Stevens, J. J.); Gregg v. Georgia, 428 U.S. 153, 181 (1976) (joint opinion of Stewart, Powell, and Stevens, J. J.) [hereafter cited as "joint opinion"]; Woodson v. North Carolina, 428 U.S. at 293, 295 (plurality opinion of Stewart, Powell, and Stevens, J. J.); Furman v. Georgia, 408 U.S. at 440-441 (Powell, J., dissenting). In McGautha v. California, 402 U.S. 183, 207-208 (1971), this Court expressly held that States were entitled to assume that jurors in capital cases "will act with due

regard for the consequences of their decision..." That specific holding was not obliterated by Furman, but instead became one of the underpinnings of the plurality opinion in Woodson v. North Carolina, supra, which held that, "it is only reasonable to assume that many juries will continue to consider the consequences of a conviction in reaching a verdict." 428 U.S. at 303. The reason that mandatory statutes simply "papered over the problem of unguided and unchecked jury discretion," id. at 302, is the same reason that the preclusion of lesser included non-capital offenses by Alabama's statute does not undermine the integrity of the fact-finding process in capital cases— jurors are and always have been extremely cautious and reluctant to convict in any capital case in which death appears to be the automatic result, and they resolve doubts in such cases in favor of the capital defendant.

B. Alabama's Statute Contains Special Safeguards that Ensure the Reliability of the Fact-Finding Process

The Alabama capital punishment statute contains special safeguards which ensure the reliability of the fact-finding process and prevent the preclusion of lesser included offenses from resulting in a wrongful imposition of the death penalty. The first safeguard is the requirement of Code of Alabama 1975, §13-11-2 that before any defendant can be found guilty of a capital offense the jury must return a verdict from which "fix[es] the punishment at death," even though the judge and not the jury is the sentencing authority. The requirement that the jury in returning any guilty verdict "fix the punishment at death" ensures that the awesome nature and terrible responsibilities of the jury's task in finding the defendant guilty of a capital offense will be fully

impressed upon each juror. It serves to reinforce the requirement of proof beyond a reasonable doubt by calling upon the historical reluctance of jurors to convict in any case where death is the result. The jury is encouraged to think that "the buck stops here."

The second safeguard contained in Alabama's statute is the mistrial mechanism. Section 13-11-2(c) provides:

> "The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole."

An "aggravated offense" is one of the capital crimes defined in §13-11-2, and an "offense wherein the indictment does not allege an aggravated circumstance" is a non-capital crime. Therefore, when a defendant in a capital case is guilty of a serious non-capital crime but there is a reasonable doubt about his guilt of the capital offense, the jury is not required to choose between convicting or acquitting him. It has a third choice— mistrial. If there is a mistrial on the capital charge the defendant may be re-indicted and retried for a non-capital offense.

The third safety device contained in Alabama's statute results from the sentencing function performed by the trial judge. Although the verdict of the jury convicting a defendant "fix[es] the punishment at death," §13-11-2(a), the trial court judge and not the jury is the sentencing authority. Code of Alabama 1975, §§13-11-3 and 13-11-4; accord, e.g., Jacobs v. State, 361 So.2d 640, 644 (Ala. 1978), cert. denied, 439 U.S. 1122 (1979); Beck

v. State, 365 So.2d 985 1001 (Ala. Cr. App.) aff'd. 365 So.2d 1006 (Ala. 1978); Evans v. Britton, 472 F.Supp. at 718. If the jury convicts the defendant of a capital offense, the sentencing process then begins. Under §13-11-3, the trial court holds a sentence hearing for the purpose of determining the appropriate sentence for the particular defendant in that specific case. The statute provides that the purpose of the sentence hearing is "to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." Id. In reversing and remanding a capital case for a new sentence hearing in Mack v. State, 375 So.2d 476, 500-501(Ala. Cr. App. 1978) aff'd, 375 So.2d 504 (Ala. 1979), the Alabama Court of Criminal Appeals described the sentence hearing required under the statute as follows:

> "The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilty stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done 'the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision.'"

The statutory aggravating and mitigating circumstances which the trial court considers at the sentence hearing are set out in §§13-11-6 and 13-11-7. With one minor difference, they are identical to the statutory

aggravating and mitigating circumstances in the Florida statute upheld in Proffitt v. Florida, 428 U.S. 242, 248 N. 6 (1976). In addition, unlike the Ohio statute struck down in Lockett v. Ohio, 438 U.S. 586 (1978), the Alabama statute does not limit the trial judge's consideration of mitigating circumstances to those enumerated in the statute. Instead, §13-11-3 expressly provides that, "In the hearing evidence may be presented as to any matter that the court deems relevant to sentence..." The Alabama appellate courts have repeatedly held that the statute provides for the consideration of non-statutory mitigating circumstances. E.g., Cook v. State, 369 So.2d 1251, 1256 (Ala. 1979); Jacobs v. State, 361 So.2d 640, 652-654 (Ala. 1978); see also, Evans v. State, 361 So.2d 654, 664 (Ala. Cr. App. 1977), aff'd 361 So.2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979).

The importance of the sentencing hearing and the consideration of non-statutory mitigating circumstances for the issue at hand is illustrated by the case of Neal v. State, 372 So.2d 1331 (Ala. Cr. App. 1979), cert. denied, 372 So.2d 1348 (Ala. 1979). In that case the defendant was convicted of robbery during the course of which the victim was intentionally killed. The capital crime also involved rape and was particularly heinous and atrocious. Neal v. State, 372 So.2d at 1347 (Decarlo, J., concurring)("this debauchery and murder"); id (Bowen, J., concurring) ("the savage and cold-blooded nature of this crime"). Nonetheless, the trial court sentenced the defendant to life imprisonment without parole instead of to death. In determining that that was the appropriate sentence, the trial court reviewed the evidence upon which the defendant

was convicted and independently weighed it. After doing so, the trial court found as a non-statutory mitigating circumstance that:

> "'While there was sufficient evidence for the jury to find Eddie Barnard Neal guilty, there was not the depth of evidence against him which this court must insist upon for the penalty of death to be invoked.'" 372 So.2d at 1346.

The trial court's sentencing determination can thus act as additional safeguard to ensure that even if there is sufficient evidence to justify the jury in finding beyond a reasonable doubt that the defendant is guilty of the capital crime, no defendant will be sentenced to death unless the "depth of evidence against him" also convinces the trial court judge that the death penalty is warranted.

In Evans v. Britton, supra, the court rejected the argument that the preclusion of lesser included offenses might result in the wrongful execution of a defendant guilty of only a lesser included non-capital offense. In doing so, the court observed that adequate statutory safeguards existed to prevent that. 472 F.Supp. at 715.

C. Juries in Capital Cases Tried Under the Alabama Statute Can be Trusted Not to Convict a Defendant Unless Convinced Beyond a Reasonable Doubt of His Guilt of the Capital Offense.

The jury in this case was properly instructed to acquit the petitioner unless it was convinced beyond a reasonable doubt of each element of the capital offense. In Parker v. Randolph, 99 S.Ct. 2132, 2139 (1979) (plurality opinion of Rehnquist, J., joined by Burger, C. J., Stewart, and White, J. J), this Court observed in regard to our system of trial by jury that:

> "A crucial assumption underlying that system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed..."

As Mr. Justice White, joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist, said in Jurek v. Texas, 428 U.S. 262, 279 (1976), "it should not be assumed that jurors will disobey or nullify their instructions." Mr. Chief Justice Burger has recognized "our basic trust in lay jurors as the keystone of our system of criminal justice," and has warned against casting doubt on the basic integrity of the jury system. Furman v. Georgia, 408 U.S. at 389, 402 (Burger, C. J., dissenting). Petitioner's argument does cast doubt on the basic integrity of our jury system, because it assumes that jurors will violate their oath and disobey their instructions, and especially because it assumes that they will do so in a capital case. In rejecting this same argument from a different petitioner, the court in Evans v. Britton, supra, said:

> "This Court would rather presume that jurors, especially in a capital case, will be true to their oaths and return verdicts in accordance with the facts and the law, rather than adopting petitioner's view that the jury can be expected to abdicate its responsibility. Indeed, to follow the petitioner's reasoning the Seventh Amendment would become a mockery in any criminal case since no juror could be presumed to abide by his or her oath in considering issues presented." 472 F.Supp. at 715 (footnote omitted).

It is true that this Court has recognized that in some contexts, such as those involved in Jackson v. Denno, 378 U.S. 368 (1974), and in Bruton v. United States, 391 U.S. 123 (1968), the "practical and human limitations of the jury system," 391 U.S. at 135 override "the theoretically sound premise that a jury will follow the trial court's instructions." Parker v. Randolph, 99 S.Ct. at

2140 (plurality opinion). But this Court has also recognized that such cases are the exceptions, and "[t]he 'rule'— indeed the premise upon which the system of jury trials functions under the American judicial system— is that juries can be trusted to follow the trial court's instructions." Id. at 2140 n. 7. As the dissent in Parker v. Randolph, supra, noted, "the controlling question must be whether it is realistic to assume that the jury followed the judge's instructions..." 99 S.Ct. at 2147 (dissenting opinion of Stevens, J., joined by Brennan and Marshall, J. J.).

To support a negative answer to that question petitioner relies heavily on Keeble v. United States, 412 U.S. 205, 213 (1973), a case in which the court interpreted a federal statute as permitting convictions on lesser included offenses thereby avoiding what it termed the "difficult constitutional questions" which would otherwise be raised. The majority opinion in that case does refer to "the substantial risk that the jury's practice will diverge from theory" in that context. Id. at 212. It also opines that, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Id. at 212-213 (emphasis in original). But the teaching of Parker v. Randolph, supra, is that whether a jury can be trusted or not in a particular circumstance must be decided with reference to the specifics of the individual circumstance. The alteration of one specific factors in two apparently similar circumstances can cause, "the constitutional scales to tip the other way." Parker v. Randolph, 99 S.Ct. at 2140 (plurality opinion).

The preclusion of lesser included offenses in the present case is different from that in Keeble and that

difference tips the scales the other way. First of all, Keeble was a non-capital case whereas the present case involves the preclusion of lesser included non-capital offenses in a capital case. At first glance, that difference would seem to support petitioner's position, since this Court has recognized a greater need for reliability in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). But important cases should not be decided on a glance. More careful consideration compels the conclusion that the fact that this is a capital case actually helps ensure the reliability of the fact-finding process and removes any possibility that preclusion will result in a wrongful conviction for the higher or capital offense. This is true because, "Juries, of course, have always treated death cases differently..." Furman v. Georgia, 408 U.S. at 286 (Brennan, J., concurring). The difference is that juries are extremely cautious in capital cases and they resolve any and all doubts against conviction when death is the penalty. This Court has relied in the past upon the predictability of such jury behavior in capital cases, and it should do so again in the present case.

The second major difference between Keeble v. United States, supra, and the present case is that there were no special statutory procedures which guarded against a wrongful conviction of the higher offense in Keeble, but there are in the present case. For example, in Keeble the jurors were not told that they could refuse to agree on a verdict or on the penalty which would cause a mistrial and make it possible for the defendant to be reindicted for a lesser offense.

It is simply unrealistic to assume that the jury in the present case, or in any other capital case tried under Alabama's statute, would disobey their oaths and

instructions, ignore the mistrial option, and wrongfully convict a defendant of a capital offense. Not only is such an assumption contrary to all the evidence and findings about jury behavior in capital cases, but it also ignores the practical effect of Witherspoon v. Illinois, 391 U.S. 510 (1968). Since capital juries are selected according to the dictates of that decision, they are especially unlikely to convict of a capital offense in spite of a reasonable doubt and return a verdict form which fixes the penalty at death.

The statistics cited on page 11 of petitioner's brief do not establish that juries have disregarded their instructions and wrongfully convicted defendants. Petitioner claims that a 96 percent conviction rate is "startling," but there is no evidence at all that the convictions referred to were based on anything but evidence proving beyond a reasonable doubt the capital offense charged. The lesser included offense doctrine developed to protect prosecutors from suffering acquittals when they failed to establish all the elements of a higher offense. E.g., Keeble v. United States, 412 U.S. at 208. Given the fact that prosecutors know that they cannot rely on the protection of that doctrine in cases brought under Alabama's capital punishment statute, it is not surprising that they have been extremely cautious about prosecuting capital indictments. Nor is it surprising that only the strongest cases are prosecuted as capital cases. See, Gregg v. Georgia, 428 U.S. 153, 225 (1976) (concurring opinion of White, J., joined by Burger, C. J., and Rehnquist, J.) ("the standards by which [prosecutors] decide whether to charge a capital offense will be the same as those by which the jury will decide the questions of guilt and sentence.")

If lesser included offenses were not precluded in capital cases, the prosecutor would have nothing to lose in bringing a capital indictment, but with preclusion he literally has everything to lose. No prosecutor likes to lose cases. In a case in which the prosecutor has any reason to doubt his ability to prove beyond a reasonable doubt each and every element of the capital offense, he is free to obtain a non-capital indictment, and he can be expected to do so. Even after a capital indictment is obtained, the prosecutor is free to reindict on a non-capital charge and prosecute it instead of the original capital indictment, and that has happened.

Alabama's statute defines fourteen different crimes as capital. Code of Alabama 1975, §13-11-2(a). The fact that only fifty capital cases had been tried during the two and three-quarter years covered by the statistics, is further evidence that only the strongest capital cases are prosecuted as capital cases.

In summary, petitioner has failed to establish that a jury cannot be trusted to properly perform its function under the Alabama capital punishment statute. In the words of the court in Evans v. Britton, 472 F.Supp. at 716, he "piles a supposition on top of an assumption to achieve the position that the burden of proof is lessened. This is simply too conjectural to bear consideration by the Court."

II.

THIS COURT HAS NEVER HELD THAT THE PRECLUSION OF LESSER INCLUDED OFFENSES IS UNCONSTITUTIONAL.

This Court has never held that the preclusion of lesser included offenses violates the Due Process Clause

or any other constitutional provision, and it should not do so in this case. While the majority opinion in Keeble v. United States, 412 U.S. 205 (1973), held that the defendant in that federal prosecution was "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater," that holding was expressly based upon Federal Rule of Criminal Procedure 31(c), cases espousing the rule in federal prosecutions, and on an interpretation of the federal statute involved in that case. 412 U.S. at 208-213. The majority opinion did state that preclusion of lesser included offenses in that context would have raised difficult constitutional questions, 412 U.S. at 213, but the present context is materially different because there is greater assurance about the reliability of fact-finding in this case. See pp. 30-31, supra. In any event, the Keeble majority did not purport to answer the constitutional issues and instead expressly limited its decision to a holding that the federal act involved did not require preclusion. 412 U.S. at 214. The majority also noted that the Court had never held that preclusion of lesser included offenses was a violation of due process. Id. at 213.

Gregg v. Georgia, 428 U.S. 153 (1976), did not hold that the preclusion of lesser included offenses was unconstitutional. The petitioner in Gregg argued that there were so many opportunities for discretionary action inherent in the Georgia capital punishment statute that the arbitrariness and capriciousness condemned in Furman still remained. 428 U.S. at 198-199. Prosecutorial discretion, the de facto sentencing discretion inherent in the availability to the jury of lesser included offenses, and the discretionary exercise of executive clemency were pointed out as possible sources of arbitrariness and capriciousness

in capital sentencing. 428 U.S. at 199. Rejecting petitioner's argument that these opportunities for discretion rendered the statute unconstitutional, the joint opinion held that Furman required only that the risk of arbitrariness and capriciousness be minimized by objective sentencing standards. 428 U.S. at 199. It noted that a decision to afford an individual defendant mercy did not violate the Constitution. Id. The opinion contains some statements in a footnote which the petitioner in the present case misconstrues to support his position.

Following up its observation that a system is not unconstitutional simply because it provides opportunities for an individual defendant to be afforded mercy, the opinion notes in the footnote in question that a contrary holding would effectively outlaw capital punishment by placing unrealistic conditions on its use. 428 U.S. at 199 n. 50. In explanation, the opinion says that a system which sought to end all sources of discretion would have to forbid executive clemency and plea bargaining, would have to require prosecutors to charge a capital offense every time one had even arguably been committed, and it would also have to require that when a jury refused to convict even though the evidence supported the capital charge its verdict of acquittal be reversed. Id. The opinion then notes that a system which did these specified things "would be totally alien to our notions of criminal justice," and it points out that reversing a jury's verdict of acquittal would be unconstitutional. Id. Contrary to the assertions of petitioner's brief, it does not say that the preclusion of lesser included offenses would be alien to our notions of criminal justice or unconstitutional. Indeed, the opinion quite conspicuously omits the preclusion of lesser included offenses

from the list of actions which it says in the footnote would be alien to our notions of criminal justice and unconstitutional. Id.

III.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S CAPITAL PUNISHMENT STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

A. The Preclusion of Lesser Included Non-Capital Offenses by Alabama's Statute Does Not Undermine the Proof Beyond a Reasonable Doubt Standard.

This Court held in In re Winship, 397 U.S. 358 (1970), that the requirement of proof beyond a reasonable doubt is an essential right protected by the Due Process Clause. Seeking that same status for the availability of lesser included offenses, petitioner's principal contention is that the preclusion of lesser included offenses undermines the requirement of proof beyond a reasonable doubt and thereby jeopardizes the reliability of fact-finding. The strategy of petitioner's argument is to elevate the availability of lesser included offenses to constitutional status by piggybacking it onto the reasonable doubt standard.

The Alabama Legislature incorporated into the capital punishment statute special safeguards to strengthen the reliability of the fact-finding process and to ensure that a defendant would not be convicted unless the jury was convinced beyond a reasonable doubt of his guilt of the capital offense. Regardless of the motives behind the preclusion clause, its adoption reflects a considered legislative judgment that the availability of lesser included non-capital offenses is not essential to enforcing the proof beyond a reasonable doubt standard under a

capital statute that contains those safeguards. Petitioner's argument to the contrary is based on speculative assumptions. Not only does petitioner ignore the special statutory safeguards built into Alabama's statute, but he also ignores long-standing perceptions of this Court about the behavior of juries in capital cases.

In Johnson v. Louisiana, 406 U.S. 356, 359-360 (1972), this Court rejected the argument that the jury unanimity requirement was essential to give substance to the reasonable doubt standard. In doing so, this Court said, "before we alter our own long-standing perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions." 406 U.S. at 362. Petitioner in the present case offers unsupported assumptions. The historical evidence concerning jurors' behavior in capital cases, this Court's previous preceptions of and reliance on the predictability of that behavior, and the special safeguards built into Alabama's statute all compel the conclusion that the availability of lesser included offenses is not necessary to give substance to the proof beyond a reasonable doubt standard. Accordingly, lesser included offenses cannot be elevated to the status of an essential of due process by piggybacking them onto the reasonable doubt standard.

B. The History of Lesser Included Offenses Does Not Establish a Due Process Right to the Availability of Them.

Petitioner argues that the history of lesser included offenses and their availability in other contexts and jurisdictions justifies recognizing the lesser included offense option as a fundamental due process right. Petitioner's reliance on history fails for two reasons. First,

history does not show that the lesser included offense doctrine developed to protect any rights or interests of defendants. Instead, history shows that the doctrine was designed and developed to assist the prosecution when the evidence failed to establish some element of the offense charged. E.g., Keeble v. United States, 412 U.S. 205, 208 (1973); Kelly v. United States, 370 F.2d 227 (D.C. Cir. 1966), cert. denied, 388 U.S. 913 (1967); United States v. Markis, 352 F.2d 860, 866 (2nd Cir. 1965).

The second reason why the history of lesser included offenses fails to establish that their availability is a due process right is that history alone does not define due process. For example, in Johnson v. Louisiana, 406 U.S. 356 (1972), this Court rejected the argument that due process required a unanimous jury and it did so in spite of the fact that the unanimous jury was "embedded in our legal history," id. at 382 n. 1 (Douglas, J., dissenting), and originated long before the American Revolution, as early as the 14th century, Id. at 383 n. 2. See also, Apodaca v. Oregon, 406 U.S. 404, 407 & n. 2, 408 (1972). Another example of a historically well established device that has been denied constitutional status is the twelve-member jury. In Williams v. Florida, 399 U.S. 78 (1970), this Court held that States were not constitutionally required to use twelve-member juries even though that had been the fixed number of jurors since the middle of the 14th century, id. at 87 n. 19, 89, even though earlier decisions had assumed that number was constitutionally required, id. at 90-91, and even though the federal courts and virtually all the States used that number. Id. at 103 n. 50; Id. at 136-137 (Harlan, J., concurring).

In Johnson v. Louisiana, supra, Apodaca v. Oregon, supra, and Williams v. Florida, supra, this Court rejected a purely historical approach and employed a

fundamental analysis instead. Using the same type of analysis in the present case, the availability of lesser included offenses is not constitutionally required because, at least under Alabama's capital punishment statute, it is not necessary to give substance to the reasonable doubt standard and is not necessary to ensure the reliability of the fact-finding process.

C. The Use of the Lesser Included Offense Option in Other Contexts and Jurisdictions Does Not Establish a Due Process Right to the Availability of It.

The fact that the lesser included offense option is available in virtually all other contexts and jurisdictions does not mean that due process requires it. The lesser included offense device developed not in response to due process concerns but for the purpose of assisting the prosecution, and its widespread use may well reflect nothing more than its usefulness for that purpose. In any event, the purpose of the Due Process Clause is not to force on any state a kind of uniform code of criminal procedure based upon the procedure of other states or of the federal government. Many cases recognize this principle.

In Patterson v. New York, 432 U.S. 197, 211 (1977), this Court held that the fact a majority of states had assumed the burden of disproving affirmative defenses did not mean that those states which followed a different practice violated due process. See also, Williams v. Florida, 399 U.S. 78, 103 & n. 50, 136-137 (1970) (holding that Florida's provision of six-member juries in all non-capital felony cases did not violate the Sixth Amendment even though the federal courts and forty-five states use twelve-member juries in all or most felony cases). Nor does the principle change when a state stands alone.

Only one state, Louisiana, authorizes a conviction on a 9 to 3 vote of the jury, Williams v. Florida, 399 U.S. at 137-138 (concurring opinion and appendix of Harlan, J.), yet this Court held in Johnson v. Louisiana, 406 U.S. 356 (1972), that despite the singularity of Louisiana's practice it was not violative of the Due Process Clause. Likewise, Leland v. Oregon, 343 U.S. 790 (1952), held that Oregon's rule requiring that a defendant prove the defense of insanity beyond a reasonable doubt was not a violation of due process. In Patterson v. New York, 432 U.S. 197, 204-205 (1977), this Court recognized the continuing validity of the Leland decision even though it noted that Oregon was the only state that placed such a requirement on the defendant.

These cases reflect important principles of federalism. As this Court said in Addington v. Texas, 99 S.Ct. 1804, 1812 (1979), "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." The problem of reducing arbitrariness and capriciousness in capital sentencing has vexed legislators and members of this Court. Alabama's statutory system of precluding lesser included offenses while providing safeguards to ensure the reliability of the fact-finding process represents a considered judgment about how to solve that problem. While Alabama's solution may be unique and may not itself be constitutionally required, that does not mean that it is unconstitutional. Since Alabama's system does not undermine the proof beyond a reasonable doubt standard and does not jeopardize the reliability of fact-finding in capital cases, Alabama should not be forced into a common, uniform mold. This is particularly true since the configuration of that

mold seems to change so frequently.

IV.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Although Not Constitutionally Required, the Preclusion of Lesser Included Non-Capital Offenses is a Legitimate and Permissible Means of Reducing Arbitrariness and Capriciousness in Capital Sentencing.

The decisions in Gregg v. Georgia, 428 U.S. 153, 199 (1976) (joint opinion), Proffitt v. Florida, 428 U.S. 242, 254 (1976) (joint opinion of Stewart, Powell, and Stevens, J. J.) [hereinafter cited as "joint opinion"], and Jurek v. Texas, 428 U.S. 262, 274 (1976) (joint opinion of Stewart, Powell, and Stevens, J. J.) [hereinafter cited as "joint opinion"], establish that the amount of, or risk of, arbitrariness and capriciousness in capital sentencing may be reduced to a constitutionally acceptable level without precluding lesser included non-capital offenses. That holding is simply one aspect of this Court's recognition that, even after Furman, perfection is not required in capital sentencing. See, e.g., Gregg v. Georgia, 428 U.S. at 226 (concurring opinion of White, J., joined by Burger, C. J., and Rehnquist, J.) ("Mistakes will be made and discriminations will occur which will be difficult to explain."); Woodson v. North Carolina, 428 U.S. 280, 317-319 (1976) (Rehnquist, J., dissenting) (recognizing defects inherent in the Georgia, Florida, and Texas statutes). The constitutional minimum which has been enforced is, "a system that does not create a substantial risk of arbitrariness or caprice." Gregg v.

Georgia, 428 U.S. at 203 (joint opinion); see also, id. at 188.

The fact that the Georgia, Florida and Texas statutes were held to meet the constitutional minimum without precluding lesser included offenses does not mean that another state cannot strive to do even better. After describing the sentencing procedures held to be acceptable in Gregg, the joint opinion in that case said:

> "We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. Rather, we have embarked on this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns." 428 U.S. at 195 (footnotes omitted).

Furman's constitutional concerns were that the administration of capital punishment statutes had been "pregnant with discrimination," Furman v. Georgia, 408 U.S. at 257 (Douglas, J., concurring); had permitted the death penalty to be "wantonly" and "freakishly" imposed, id. at 310 (Stewart, J., concurring); and had resulted in the death penalty being imposed with such "great infrequency" that there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," id. at 313 (White, J., concurring). Accord, id. at 293, 305 (Brennan, J., concurring); Gregg v. Georgia, 428 U.S. at 188 (joint opinion).

The preclusion of lesser included non-capital offenses serves to meet those concerns by removing an historically proven and logically inescapable source of discretion that can interject an amount of arbitrariness and capriciousness into capital sentencing. While Gregg, Proffitt, and Jurek stand for the proposition that the amount or risk of arbitrariness resulting from the availability

of lesser included offenses is not so substantial as to itself violate the Constitution, Alabama should be free to decide that it can go beyond the minimum and reduce the level of arbitrariness and capriciousness even further than required.

The history of lesser included offenses demonstrates their potential as a source of de facto sentencing discretion that can lead to some degree of arbitrariness and capriciousness in the administration of capital punishment. See, Woodson v. North Carolina, 428 U.S. 280, 291, 293 & n. 29, 302 (1976) (plurality opinion); id. at 311-313 (Rehnquist, J., dissenting); McGautha v. California, 402 U.S. 183, 199 (1971); Furman v. Georgia, 408 U.S. at 246-247 (1972) (Douglas, J., concurring). The principal reason the mandatory death penalty statute in Woodson v. North Carolina, supra, "simply papered over the problem of unguided and unchecked jury discretion." 428 U.S. at 302-303 (plurality opinion), was that it permitted the jury to convict on lesser included non-capital offenses. All that a North Carolina jury had to do to avoid the imposition of the death penalty under that statute was to return a verdict for second degree murder. The same was true of the Louisiana statute struck down in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), where the plurality reasoned that the availability of lesser included offenses "plainly invite[d] the jurors to disregard their oaths and choose a verdict of a lesser offense whenever they feel that the death penalty [was] inappropriate," thereby interjecting an element of capriciousness. 428 U.S. at 334-335 (plurality opinion). The prediction upon which Roberts is bottomed is that at least some Louisiana juries would convict of only a lesser included offense even though all the jurors were convinced that

the greater capital offense had been proven. Woodson v. North Carolina, 428 U.S. at 314 (Rehnquist, J., dissenting).

While the use of lesser included offenses as a mechanism of de facto sentencing discretion is more obvious in mandatory statutes and will more frequently lead to arbitrariness and capriciousness under such statutes, the same result can occur under non-mandatory statues. As Mr. Chief Justice Burger noted in Furman, "there is no assurance that sentencing patterns will change so long as juries are possessed of the power to...bring in verdict of guilt on a charge carrying a lesser sentence." Furman v. Georgia, 408 U.S. at 401(Burger, C. J., dissenting). This is true, because whenever a statute, "gives the jury the power to find guilt in a lesser degree, the law leaves the jury great leeway." Witherspoon v. Illinois, 391 U.S. 510, 529 (1968) (separate opinion of Douglas, J.). That leeway results in part from what the Woodson plurality called the "amorphous nature of the controlling concepts of willfulness, deliberateness, and premeditation," which are usually employed to separate first degree murder from murder in the second degree, Woodson v. North Carolina, 428 U.S. at 290-291, and which leave room for the play of jurors' prejudices and emotions. The potential for lesser included offenses being used as a de facto outlet for sentencing considerations is exacerbated by the practical effect of the Witherspoon decision. By holding out for a conviction on a non-capital lesser included offense even when they are convinced that the defendant has committed the capital offense, jurors who have conscientious scruples against the death penalty can avoid any possibility that that penalty will later be imposed by the sentencing authority. This element of capriciousness is especially likely to infect the guilt stage where, as here, the

sentencing authority is the judge and not the jury.

A state has abundant reasons for choosing to make the trial court judge the sentencing authority. The inexperience of jurors in dealing with sentencing information is a problem inherent in any system which gives jurors a voice in the sentencing determination. Gregg v. Georgia, 428 U.S. at 192 (joint opinion). Because trial court judges are more experienced in sentencing, judicial sentencing in capital cases has the potential for achieving greater rationality and consistency of results. Proffitt v. Florida, 428 U.S. at 252 (joint opinion); accord, Beck v. State, 365 So.2d 985, 1001 (Ala. Cr. App. 1978), aff'd, 365 So.2d 1006 (Ala. 1978) (A.43). It also helps make appellate review of sentencing decisions, which was found so constitutionally valuable in Gregg and Proffitt, more effective by providing a detailed objective record of the factors considered by the sentencer at the trial level.

The preclusion of lesser included offenses is more important when the judge is the sentencing authority than when the jury sentences in a capital case. If the jury has a substantial or decisive say in the sentencing decision, as in Florida or Georgia, then it is less likely that the jury's determination of guilt will be infected by the desire of any jurors to avoid imposition of the death penalty. Those jurors who oppose the death penalty can vent their feelings during the sentencing stage. However, if a state elects to pursue the advantages of judicial sentencing to the utmost and thereby maximize consistency and rationality in capital sentencing, as Alabama has done, then those jurors who oppose capital punishment in a particular case or in general cannot use the sentencing stage to prevent imposition of

the death penalty. Such jurors can work against the imposition of the death penalty only during the guilt determination stage.

The availability of lesser included offenses not only makes that possible, but also relatively easy. Jurors who are motivated by opposition to the death penalty are much more likely to convince their fellow jurors to convict a guilty capital defendant of a lesser included offense carrying a lengthy prison sentence than they are to convince their fellow jurors, even if they can convince themselves, to acquit the guilty capital defendant. Whenever a defendant guilty of a capital offense escapes conviction for that offense through the lesser included offense mechanism, some capriciousness in overall sentencing results. The preclusion of lesser included non-capital offenses is thus a rational means of striving for the greater consistency promised by a system of judicial sentencing in capital cases.

There is an additional reason why the preclusion of lesser included offenses is valuable under Alabama's statute. The statute requires that any verdict of the jury convicting the defendant of a capital offense, "fix the penalty at death." Code of Alabama 1975, §13-11-2(a). This requirement does not make the Alabama statute a mandatory one because the judge, who is the actual sentencing authority, may sentence a convicted capital defendant to life imprisonment without parole. The requirement that the jury verdict form "fix the penalty at death" serves the constitutionally laudable purpose of bringing home to the jury the need for great caution and helps ensure that the jury will convict of the capital offense only when it is truly convinced beyond a reasonable doubt and to a normal certainty that the defendant is guilty of it.

Because Alabama has chosen to safeguard the reliability of fact-finding in capital cases in this manner, the preclusion of lesser included non-capital offenses is a rational means of ensuring that de facto sentencing discretion is not simply "papered over" but instead is properly limited to prevent capricious sentencing results. Other states have chosen not to use the same procedures, but Gregg v. Georgia, 428 U.S. at 195 (joint opinion), noted that the statutes upheld by this Court so far are not the only permissible way to pursue the same constitutional goals, and each distinct system must be examined on an individual basis.

B. The Distinction Between Capital and Non-Capital Cases is Rationally Related to the Legitimate Purpose Served by the Preclusion of Lesser Included Offenses.

Under the traditional equal protection test, a legislative classification is presumed to be valid. E.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Schlib v. Kuebel, 404 U.S. 357, 364 (1971). The classification violates the Equal Protection Clause if it is based on criteria, "wholly unrelated to the objective of the statute," Reed v. Reed, 404 U.S. 71, 76 (1971), but does not violate the clause if it bears some rational relationship to a legitimate state purpose. E.g., San Antonio School District v. Rodriguez, 411 U.S. 1, 40 (1973); McGinnis v. Royster, 410 U.S. 263, 270, 276 (1973); Schlib v. Kuebel, 404 U.S. at 364-368.

The legitimate state purpose behind the preclusion of lesser included non-capital offenses is the reduction of the risk or level of arbitrariness and capriciousness in capital sentencing by the removal of a mechanism for unguided de facto sentencing discretion. Since the

availability of lesser included offenses in non-capital cases does not pose any risk to the consistency of capital sentencing, the differentiation between capital and non-capital cases is rational, Evans v. Britton, 472 F. Supp. 707, 716 (S.D. Ala. 1979), being wholly determined by the purpose of preclusion. Any argument that consistency and rationality in sentencing is not more important in capital than in non-capital cases is contrary to Furman.

Most of petitioner's equal protection argument is premised on his contention that the availability of lesser included offenses is a procedural safeguard the denial of which jeopardizes due process rights. That premise should be rejected for the reasons discussed previously in this brief. The overlap of petitioner's due process and equal protection arguments is especially obvious in his contention that strict scrutiny should be applied.

C. The Strict Scrutiny Test is Not Applicable Because the Classification Does Not Infringe a Fundamental Right.

Strict judicial scrutiny of a classification is appropriate under the Equal Protection Clause only when the classification operates to the disadvantage of a suspect class or infringes upon a fundamental right. E.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973). This Court has never declared capital defendants to be a suspect class for equal protection purposes, and petitioner does not press for that proposition in his brief. Instead, petitioner's argument for strict scrutiny is based upon his contention that the preclusion of lesser included offenses infringes upon a

fundamental right.

As this Court held in San Antonio School District v. Rodriguez, supra, the only rights which are "fundamental" for purposes of invoking strict scrutiny are those which are "explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 33-34. To the extent that petitioner's argument for strict scrutiny claims that the availability of lesser included offenses is itself a "fundamental right," then the argument must fail because the Constitution neither explicitly nor implicitly guarantees the availability of lesser included offenses. To the extent that petitioner's argument is based upon a claim that preclusion of lesser included offenses infringes his fundamental right to the proof beyond a reasonable doubt standard or to reliable fact-finding, then that argument must fail because preclusion under Alabama's statute does not undermine that beyond a reasonable doubt standard or jeopardize the reliability of fact-finding, and therefore capital defendants lose no protection under the statute.

The infringement upon a fundamental right component of petitioner's strict scrunity argument assumes as its premise that for which he argues on the due process issue. By clothing his due process contentions in the guise of equal protection, petitioner would have this Court disregard the wisdom of its own words, when it said, that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio School District v. Rodriguez, 411 U.S. at 33 (majority opinion); accord, id. at 59 (Stewart, J., concurring).

V.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S STATUTE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT.

A. Preclusion Does Not Make Alabama's Statute a Mandatory Capital Punishment Statute and It Does Not Prevent Individualized Sentencing.

Unlike the statutes struck down in Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), and Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977), the Alabama statute is not a mandatory death penalty act. A mandatory death penalty statute is one which requires that every defendant convicted of a capital offense be sentenced to death, without regard to the character and record of the individual defendant and the circumstances of the particular capital offense. Woodson v. North Carolina, 428 U.S. at 286-287, 304. Roberts (Stanislaus) v. Louisiana, 428 U.S. at 331, 333; Roberts (Harry) v. Louisiana, 431 U.S. at 634 n. 1, 636-637. Alabama's statute expressly provides that a defendant convicted of a capital offense may be sentenced to life imprisonment without parole instead of death, Code of Alabama 1975, §§13-11-3 and 13-11-4, and as of December, 1978, eighteen defendants convicted of capital offenses had in fact been sentenced to life imprisonment without parole. That fact alone establishes that Alabama's statute is not a mandatory death penalty act. Evans v. Britton, 472 F.Supp. 707, 718 (S.C. Ala. 1979).

Section 13-11-2 does require that before a defendant can be found guilty of a capital offense the jury must return a verdict form which "fix[es] the punishment at

death." The purpose of that requirement is to reinforce the proof beyond a reasonable doubt standard and safeguard the reliability of the fact-finding process at the guilt stage. Even though the jury's verdict form must make that reference to the penalty of death, the jury does not determine the sentence. The judge and not the jury is the sentencing authority. Code of Alabama 1975, §§13-11-3 and 13-11-4; accord, e.g., Jacobs v. State, 361 So.2d 640, 644 (Ala. 1978), cert. denied, 439 U.S. 1122 (1979); Beck v. State, 365 So.2d 985, 1001 (Ala. Cr. App.), aff'd, 365 So.2d 1006 (Ala. 1978) (A. 43); Evans v. Britton, 472 F. Supp. at 718. After a jury returns a verdict convicting a defendant of a capital offense, its role ends. The guilt stage is over and the sentencing stage begins.

Section 13-11-3 requires that a sentence hearing be held for every defendant convicted of a capital offense. At the sentence hearing, "an experienced trial court judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole." Mack v. State, 375 So.2d 576, 500-501 (Ala. Cr. App. 1978), aff'd 375 So.2d 504 (Ala. 1979). In making the sentence determination, the trial judge must consider the aggravating and mitigating factors set out in §§13-11-6 and 13-11-7. Except for a minor difference, they are identical to the statutory aggravating and mitigating circumstances in the statute upheld in Proffitt v. Florida, 428 U.S. at 248 n. 6.

Unlike the statute struck down in Lockett v. Ohio, 438 U.S. 586 (1978), the Alabama statute does not limit the sentencing authority's consideration of mitigating circumstances to those enumerated in the statute. Instead, §13-11-3 provides that, "evidence may be presented as to any matter the court deems relevant to sentence,"

and the Alabama courts have repeatedly held that the statute provides for consideration of non-statutory mitigating circumstances. E.g., Cook v. State, 369 So.2d 1251, 1256 (Ala. 1979); Jacobs v. State, 361 So.2d 640, 652-654 (Ala. 1978), cert. denied, 439 U.S. 1122 (1979); see also, Evans v. State, 361 So.2d 654 (Ala. Cr. App. 1977), aff'd, 361 So.2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979).

Because preclusion does not mean that every defendant convicted of a capital offense is sentenced to death, and because it does not prevent the trial court judge as sentencing authority from considering the character and record of the individual defendant and the circumstances of the particular capital offense, preclusion is not contrary to Lockett, Woodson, or the Roberts decisions.

B. The Fact That Other States Do Not Preclude Lesser Included Non-Capital Offenses Does Not Mean That Preclusion Violates the Cruel and Unusual Punishment Clause.

In holding that the Cruel and Unusual Punishments Clause of the Eighth Amendment was violated by imposition of the death penalty for rape of an adult woman, the plurality in Coker v. Georgia, 433 U.S. 584, 595-596 (1977), noted that Georgia was the only state authorizing capital punishment for that crime. It does not follow from Coker that the clause is violated whenever a state uses a procedure in capital punishment cases which is different from all other states. Coker involved the quantum of punishment, not procedure. The issue of whether a punishment is excessive in relation to a particular crime was held to be within the scope of the Cruel and Unusual Punishment Clause, Coker v. Georgia, 433 U.S. at 592 (plurality opinion), but the death penalty is not

an excessive punishment for petitioner's crime of first degree murder of three adult human beings during the course of a robbery. Id. at 598 ("Rape...does not compare with murder, which does involve the unjustified taking of human life.")

Woodson v. North Carolina, 428 U.S. 280 (1976), does not stand for the proposition that the Eighth Amendment mandates uniformity of procedure in capital cases. It was not so much a procedure that was held unconstitutional in Woodson as it was an underlying judgment that death could be the proper sentence for all defendants convicted of specified capital offenses regardless of individualized circumstances concerning the offense and offender. See Woodson v. North Carolina, 428 U.S. at 292-298, 301, 303-304 (plurality opinion); Lockett v. Ohio, 438 U.S. at 601 (plurality opinion). The preclusion of lesser included offenses does not embody such a judgment, and the Alabama statute provides for individualized sentencing and consideration of all the relevant circumstances concerning the offense and offender. See pp. 25-26, supra.

The plurality opinions in Woodson and Coker, did consider "contemporary community values" and "evolving standards of decency," but consideration of such factors does not compel the conclusion that preclusion, like mandatory death penalty provisions or capital punishment for rape, is contrary to the Cruel and Unusual Punishments Clause. In both Woodson v. North Carolina, 428 U.S. at 295 and Coker v. Georgia, 433 U.S. at 596, the plurality relied upon the jury as "a significant and reliable objective index of contemporary values," id. at 596, quoting Gregg v. Georgia, 428 U.S. at 181, accord, Furman v. Georgia, 408 U.S. at 440-441 (Powell, J., dissenting) (noting that any attempt to discern the prevailing standards of decency must consider the response of juries); Witherspoon v. Illinois, 391 U.S. 510, 519-520 & n. 15 (1968)

(juries "express the conscience of the community" and their actions reflect "contemporary community values").

Nor do history and traditional usage compel the conclusion that preclusion of lesser included non-capital offenses violates the Cruel and Unusual Punishments Clause. History shows that lesser included offenses were designed and developed to assist the prosecution when the evidence at trial failed to establish some element of the offense charged, e.g., Keeble v. United States, 412 U.S. 205, 208 (1973); Kelly v. United States, 370 F.2d 227 (D.C. Cir. 1966), cert. denied, 388 U.S. 913 (1967); United States v. Markis, 352 F.2d 860, 866 (2nd Cir. 1965), and traditional usage reflects no more than that fact. Even if traditional usage did reflect a general judgment that the availability of lesser included offenses was necessary as a procedural safeguard in other contexts and circumstances, the special situation under Alabama's capital punishment statute is different.

In judging the constitutionality of procedural devices in capital cases, this Court should not adopt an Eighth Amendment approach which focuses upon the singularity or lack of singularity of the procedure. To do so would divert attention from what should be the principal inquiry, would conscript the Cruel and Unusual Punishments Clause to a use for which it was not intended, would call into question the validity of statutes recently upheld by this Court, and would destroy the doctrine of federalism in this area of the law. The principal inquiry in judging the constitutionality of the preclusion of lesser included non-capital offenses should be whether or not it undermines the reasonable doubt standard and jeopardizes the reliability of fact-finding. If preclusion does undermine the reasonable doubt standard and

jeopardize the reliability of fact-finding under Alabama's statute, that is a due process concern, and the Due Process Clause is an adequate tool with which to handle it. If preclusion does not undermine the reasonable doubt standard and jeopardize the reliability of the fact-finding process, then there is no reason for holding preclusion to be offensive to the Eighth Amendment.

The Cruel and Unusual Punishments Clause was never intended to force procedural uniformity on the states in capital cases or any other kind of cases. See, Furman v. Georgia, 408 U.S. at 317-321, 322 (Marshall, J., concurring) ("Thus, the history of the clause establishes that it was intended to prohibit cruel punishments."); id. at 242-245 (Douglas, J., concurring); id. at 376-379 (Burger, J., dissenting). Those who would use it for that purpose would have this Court enact what would amount to a uniform code of procedure for capital cases. Under such a regime, states could safely change their procedure, if at all, only by acting in unison.

If this Court holds that procedural singularity is per se bad, that holding would raise serious questions about the validity of a large number of capital punishment statutes including some which this Court has recently upheld. For example, Texas uses an unusual three-question procedure to determine sentencing in capital cases, Jurek v. Texas, 428 U.S. 262, 269 (1976). Would the singularity of that procedure compel a re-examination of the holding in Jurek? Georgia provides that if the jury is unable to agree on punishment, a sentence less than death must be imposed. Gregg v. Georgia, 428 U.S. at 208 n. 2. If it is determined that most other states provide for a declaration of mistrial and the empaneling of a new sentencing jury, would that mean Georgia's different rule is constitutionally offensive? Florida provides that the jury's

advisory verdict on sentencing is determined by majority vote, Proffitt v. Florida, 428 U.S. at 248-249. Is the Florida statute doomed if other states have different requirements? See generally, Jurek v. Texas, 428 U.S. at 269, n. 5.

This Court held in Addington v. Texas, 99 S.Ct. 1804 1812 (1979), that federalism requires that states not be forced into a common procedural mold. Addington was a case which applied the Due Process Clause, but the same holding has been reached in an Eighth Amendment case. Gregg v. Georgia, 428 U.S. at 195 (plurality opinion), declared that procedural uniformity was not required in capital punishment cases and that "each distinct system must be examined on an individual basis." If federalism is to have any meaning, this Court should not depart from that rule and should not hold that procedural singularity is constitutionally offensive. Instead, this Court should examine Alabama's statute, including its preclusion of lesser included non-capital offenses, on an individual basis.

VI.

THE PRECLUSION OF LESSER INCLUDED OFFENSES WAS NOT UNCONSTITUTIONAL IN THIS PARTICULAR CASE BECAUSE THERE WAS NO EVIDENTIARY BASIS FOR THEM.

At no point in his brief does petitioner claim an evidentiary basis for charging the jury on lesser included offenses. Clearly, the order by this Court granting certiorari in Beck v. Alabama, (U.S. Supreme Court No. 78-6621) was limited solely to those cases where the evidence would have supported a verdict of guilt of a lesser included non-capital offense.

As the United States Supreme Court held in Sansome v. United States, 380 U.S. 343, 350 (1965), "A lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser included offense." Accord, e.g., United States v. Madden, 525 F.2d 972, 973 (5th Cir. 1976); United States v. Flint, 534 F.2d 58, 60 (5th Cir.), cert. denied, 429 U.S. 924 (1976). It is neither necessary nor proper to permit a jury to consider convicting a defendant for a lesser offense unless the jury could rationally find that although all the elements of the higher offense had not been proven all of the elements of the lesser offense had been. E.g., Sansome v. United States, 380 U.S. at 351; Methvin v. United States, 441 F.2d 584, 586 (5th Cir. 1971), cert. denied, 404 U.S. 839. The case of Keeble v. United States, 412 U.S. 205 (1973), is not to the contrary, because in that case the defendant's intent to create serious bodily harm was "very much in dispute at trial." 412 U.S. at 213. Since that intent was an element of the higher offense but not of the lesser offense, the Court specifically found that the jury "could rationally" have convicted the defendant of the lesser offense instead of the greater one. 412 U.S. at 213. Absent a factual dispute over the existence of an element necessary only to the higher offense, the result is to the contrary. As the Court said in Sansome v. United States, 380 U.S. at 354-355:

> In sum, it is clear here that there were no disputed issues of fact which would justify instructing the jury that it could find that petitioner had committed all the elements of either or both of the [lesser offenses] without having committed a violation of the [higher offense]. This being the case, the petitioner was not entitled to a lesser included offense charge...

The rule described is the rule which prevails in the federal courts, but the same rule generally applies in Alabama courts. Under Alabama law, the general rule is that a defendant is not entitled to have the jury consider a lesser included offense unless under a reasonable theory based upon the evidence the defendant could be guilty of the lesser offense instead of the greater one. E.g., Fulgham v. State, 291 Ala. 71, 277 So.2d 886, 890 (1973) (upholding refusal to instruct on manslaughter in the second degree in a murder case); Kelly v. State, 235 Ala. 5, 176 So. 807, 808 (1937) (upholding refusal to instruct on manslaughter in the first degree in a murder case); Golston v. State, 57 Ala. App. 623, 330 So.2d 446, 449-450 (1975) (upholding refusal to instruct on attempted robbery in a robbery case); Harvest v. State, 342 So.2d 1369, 1372 (Ala. Cr. App. 1977) (upholding refusal to instruct on petty larceny in a grand larceny case); Harris v. State, 44, Ala. App. 654, 219 So.2d 410 413 (1969) (upholding refusal to instruct on grand larceny in a robbery case); Bowman v. State, 44 Ala. App. 331, 208 So.2d 241, 244-245 (1968) (upholding refusal to instruct on lesser included offenses in a robbery case). These cases also establish that where evidence is undisputed, there can be no evidentiary basis for permitting the jury to consider any lesser included offenses.

There is a significant difference between preventing a jury in a capital case from considering a lesser included offense supported by the evidence and preventing it from considering a lesser included offense which has no basis in the evidence. That difference was recognized by the Supreme Court when it limited its grant of certiorari in Beck v. Alabama, supra, to the constitutionality of not permitting a jury to consider a verdict of guilty on a lesser included non-capital offense "when

the evidence would have supported such a verdict."

No case has been cited which holds that the constitution requires that lesser included offenses be submitted to the jury when there is no factual basis in the evidence for them. Gregg v. Georgia, 428 U.S. 153 (1976), at least implicitly, holds to the contrary. Under the Georgia capital punishment statute upheld in Gregg, "the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence." 428 U.S. at 163. However, the Georgia statute does not require that lesser included offenses be submitted to the jury if they are not supported "by any view of the evidence." The Gregg case is itself an example. Gregg was charged with murder during the course of a robbery. The trial court charged the jury on felony murder, non-felony murder, and on the lesser included offenses of robbery, but it specifically refused to charge on the lesser included offense of manslaughter. 428 U.S. at 160, 215-216. The Supreme Court expressly noted that the Georgia Supreme Court had upheld the trial court's refusal to instruct the jury on voluntary manslaughter, "since there was no evidence to support that verdict." 428 U.S. at 161, n. 2 (opinion of Stewart, Powell, and Stevens, J.J. - hereinafter referred to as "joint opinion"). The Supreme Court upheld the Georgia statute and affirmed the judgment of the Georgia Supreme Court. Therefore, Gregg v. Georgia, supra, establishes that it is not unconstitutional in a capital case to prevent a jury from considering lesser included non-capital offenses when there is no evidentiary basis for them.

According to the latest word from the Supreme Court, in order to comply with Furman, capital punishment procedures should not create "a substantial risk that the

death penalty would be inflicted in an arbitary and capricious manner." Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion). Furman requires that sentencing discretion be "directed and limited" so that the death penalty will be imposed in a more "consistent and rational manner" and so that there will be a meaningful basis for distinguishing the cases in which it is imposed from the cases in which it is not imposed. Lockett v. Ohio, supra. Permitting the jury in a capital case to convict for a lesser included non-capital offense which has no basis in the evidence will only serve to promote jury nullification and the kind of de facto sentencing discretion which will cause the death penalty to be inflicted in an arbitrary and capricious manner. Instructing a jury to apply the law and decide the case on the basis of the evidence and then giving them a tool which serves no purpose other than to permit them to disregard the law and evidence is illogical. It does not promote consistent and rational sentencing, but just the opposite. A verdict convicting a defendant of a lesser included offense for which there is no factual basis in the evidence can only be based on caprice or emotion rather than reason. A defendant is not constitutionally entitled to that.

VII.

ALABAMA'S PROCEDURE OF DEFERRING THE TRIAL JUDGE'S CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL THE JURY HAS IMPOSED THE DEATH SENTENCE IS NOT VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner contends that the Alabama death penalty statute is unconstitutional in that it places the trial

judge in the position of having to override the jury's death sentence, thus subjecting him to the brunt of public outcry should he decide the death penalty to be inappropriate.

However, while petitioner states that such a procedure is fraught with peril, he offers no concrete empirical evidence to support this conclusion.

Moreover, there is absolutely no indication or evidence that any trial judge has left a death sentence intact in a case where life imprisonment without parole was warranted. To the contrary, the trial judge is statutorily required to weigh the aggravating and mitigating circumstances and if the court upholds the death sentence, the judge must list the aggravating circumstances which support the sentence and any mitigating circumstances which are insufficient to outweigh the aggravating circumstances. Hence, this procedure eliminates a sentence founded on fear or popular opinion.

Furthermore, historical experience directly contradicts the fear that trial judges will not perform their statutory duty. See Jacobs v. Alabama, Ala., 361 So.2d at 654, where the majority opinion of the Alabama Supreme Court stated:

> In his original dissent, Mr. Justice Jones states: "The majority's judical review 'cure all' obtains even less credence when it is understood that such guided discretion is placed upon a popularly-elected official." He supports his conclusion dehors the record by citing an example in footnote 3 of his dissent, and states that public comment or clamor will influence trial judges to ignore mitigating circumstances. We hesitate to go outside the record to answer Mr. Justice Jones' conclusion, but we feel constrained to do so, since he infers that elected judges will not do their sworn duty, and will be unduly swayed by public pressure. Since Mr. Justice Jones made his observation, we have been informed that the same trial judge who conducted the trial in the case mentioned by Justice Jones

> has again sentenced a defendant to life without parole. State v. Eddie Bernard Neal, #78-00693, decided August 7, 1978, 10th Judicial Circuit. We are also informed that a jury in Covington County acquitted a defendant charged under the capital felony statute. State v. David Bonner, #CC 7825, decided April 19, 1978, 22nd Judicial Circuit. Consequently, any suggestion that either judges or jurors will fail to do their sworn duty because of public comment or clamor should not be entertained.

The fact that a trial judge, who was subjected to what petitioner and Justice Jones perceived to be such an outcry of public criticism, later sentenced another defendant to life without parole indicated that trial court judges will not be unduly influenced by public opinion.

The sentencing decisions which trial court judges have made under Alabama's new capital punishment act further evidence that public pressure will not prevent judges from pronouncing non-capital sentences when they feel that the mitigating and aggravating circumstances in a particular case do not justify the death penalty. Under Alabama's new Death Penalty Act, over forty-five hearings have been held after a defendant pleaded not guilty and was convicted by a jury. In at least eight of these cases, the trial judge has sentenced the defendant to life imprisonment without parole instead of to death. Hence, petitioner's argument is without merit.

VIII.

SUFFICIENT AGGRAVATING CIRCUMSTANCES WERE PRESENT TO SUPPORT PETITIONER'S DEATH SENTENCE.

Petitioner claims that his death sentence was given because of the trial court's finding that petitioner's crime was "especially heinous, atrocious or cruel" (Code of Alabama 1975, §13-11-6). Petitioner then goes on to argue that this particular aggravating circumstance

is void for vagueness.

However, Petitioner's death sentence was not grounded on this particular circumstance, but rather was based on other aggravating circumstances present, namely, that petitioner created a great risk of death to many persons and that the capital felony was committed for pecuniary gain.

Hence, there were at least two additional aggravating circumstances present and the Court of Criminal Appeals opinion amply pinpoints this fact.

Hence, even absent the finding that petitioner's crime was especially heinous, atrocious and cruel, there were ample aggravating circumstances to merit petitioner's sentence.

IX.

MASSIAH V. UNITED STATES DOES NOT APPLY TO FRESH CRIMINAL CONDUCT ENGAGED IN BY DEFENDANT AFTER INDICTMENT.

Appellant contends that the testimony of Joe Pitts and Dorald Welch should have been suppressed under the authority of Massiah v. United States, 337 U.S. 410, 84 S.Ct. 1199, 12 S.Ed. 246. He cites no other authority for this position. Several features are present in this case which distinguish it from Massiah.

In Massiah a co-defendant was recruited by the government to help them obtain further evidence against Massiah. The government had no information that Massiah was engaged in new criminal activities or that he was engaged in suppression of evidence. Massiah's co-defendant allowed the government to place an electronic device in his car. Then the co-defendant invited Massiah into his car and engaged him in conversation about his

case while agents listened in. This court held that this was a secret interrogation of Massiah in the absence of his counsel and violated the Sixth Amendment.

In the case at bar the witness Donald Welch testified that he was approached by the defendant on July 12, 1978. On that occasion the defendant asked Welch to kill the witness Beverly Crawford. The defendant gave Welch a map to aid Welch in locating the house of Beverly Crawford. He informed him that he had a suicide note written out which was to be signed by Beverly before anything was done to her and sent to the defendant's mother (Tr. p. 709). No law enforcement authorities knew of this plot or conversation at this time. Some time after this conversation Welch informed the Sheriff of the plot and turned over the map. Later the defendant gave Welch the purported suicide note. Welch was asked if he was meeting again with the defendant and said he was. (Tr. p. 724) On July 15, 1978, Welch talked to the defendant and police authorities listened over a radio transmitter Welch had on his person. Welch was not told what the authorities wanted but he thought they were just curious about Beverly, trying to protect her, trying to find out what was really going on. (Tr. p. 726) He was told to talk about just the business about Beverly. (Tr. p. 728) There was no evidence that Welch talked about the case in chief or heard any trial strategy or other communication between the defendant and his lawyer. The conversation did contain information that was vital in protecting the life of the witness Beverly Crawford such as other attempts to hire people to kill her and the defendant's seriousness concerning the plot.

At the threshold the state submits that no Fourth

Amendment issue is present. It is well established that the protections afforded by the Fourth Amendment are available only to persons who have a reasonable expectation of privacy. In this case one of the participants in the conversation was aware that the conversation was being overheard and had given his permission. It is obvious that the defendant was not relying on the security of his privacy but acted on a misplaced confidence that Welch would not reveal his wrong doing. As this Court stated in Hoffa v. United States, 87 S.Ct. 408, 385 U.S. 293:

> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that very contention less than four years ago in Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 S Ed. 2d 462.

This principle has been embodied in a long line of decisions by this Court including On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed.1270 and United States v. White, 401 U.S. 745, 91 S.Ct. 1122. And as was said in On Lee and quoted in White, supra,

> It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by far fetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search and seizure.

The listening device does not invade any privacy. It merely provides corroboration for what the person carrying it already knows and is free to tell or write down. Alabama's constitutional provision on search and seizures is almost identical to the Fourth Amendment. This issue was dealt with in Hammond v. State, 354 So.2d

200, cert. denied 354 So.2d 294, and upheld the contention of the state.

Therefore, the question is does Massiah, supra, immunize an indicted defendant from revelations of any fresh criminal conduct in which he participates after indictment and which involves oral communications and conspiracy directed toward suppressing evidence. The answer to this question must be a resounding no. To answer otherwise would allow an indicted defendant to commit crimes which involve conspiracy and suppression of evidence with no fear of the consequences.

The case of Hoffa v. United States, supra, made it clear that Massiah does not apply to fresh criminal conduct. There a government informer was allowed to testify as to conversations overheard by him involving Hoffa in jury tampering in a former trial. The evidence indicated that this informer had been placed in Hoffa's hotel suite by the government. This informer's testimony was allowed in Hoffa's trial for jury tampering. While there was some discussion as to the admissibility of the testimony at Hoffa's former trial, that discussion centered around the possibility of the informer overhearing communications between Hoffa and his counsel as to trial strategy. There was no indication that this practice violated Massiah.

In the present case the defendant initiated his fresh criminal conduct with the informer with the knowledge of the state. This investigation into the death plot did not begin until authorities were informed that it had already commenced. This situation is totally different from United States v. Anderson, 523 F.2d 1193, where police had no information as to continuing criminal activity. Further, the evidence in this case clearly shows that the police did not go

to the defendant and suggest criminal activity to bolster their case as was done in Anderson. In fact Anderson recognized the propriety of continuing investigations and the principle that Massiah does not immunize a defendant for crimes committed after indictment. They merely ruled that Massiah controlled where the government did not establish any ongoing investigation of the defendant on the suspicion that, after being indicted, he was continuing his alleged criminal conduct. Of course, it was established in this case that the government had information that the defendant was involved in new criminal conduct.

The state submits it can find no case that excludes acts or statements of an indicted defendant who is engaged in a conspiracy or plot to suppress evidence or bribe witnesses or jurors. However, there are several cases which hold that Massiah does not apply to facts such as those found in the case at bar.

In United States v. Merrit, 527 F.2d 713 (7 Cir. 1975) the defendant tried to bribe a witness after indictment. This witness had previously agreed to cooperate with the F.B.I. He informed the F.B.I. of the offer. The F.B.I. equipped this informer with a listening device whereby the F.B.I. was allowed to listen to a conversation between the defendant and the witness. This conversation contained admissions in the case in chief and the attempt to bribe. The government tried to avoid a Massiah question by reindicting the defendant. However, both the district and appeals courts found the indictments were identical and were the same for the purpose of deciding whether Massiah applied to this situation. The Seventh Circuit ruled the conversations and tapes were admissible and

Massiah did not apply. The Court stated,

> Massiah applies to incriminating statements about past conduct obtained after indictment through the equivalent of police interrogation. It does not confer immunity for utterances, such as Merrit's solicitation of a bribe, which are not statements about past conduct but constitute criminal acts in themselves. It does not confer a right to the assistance of counsel in committing a new crime or in completing an old one.

In United States v. Taxe, 540 F.2d 961, cert. denied 429 U.S. 1040 (9 Cir., 1976) the defendant solicited perjured testimony. The person solicited reported this to the government. At the government's request the informant telephoned the defendant and had a conversation about the solicitation. The phone conversation was taped and allowed into evidence as impeachment. While this case involved the use of the conversation as impeachment the Court cited Merrit, supra, and stated that with solicitation the charge, not potentially legitimate client-counselor communication is in issue.

A case very similar to this present case is Grieco v. Meachum, 533 F.2d 713 (1 Cir., 1976), cert. denied sub nom Cassesso v. Meachum, 97 S.Ct. 158. In Grieco, supra, a man named Galvin was approached by a friend of the defendant Cassesso. Calvin was serving a life sentence at the time. Galvin was asked to confess to the murder for which Cassesso had been indicted in exchange for $50,000. Galvin reported this offer to the F.B.I. The F.B.I. asked Galvin to approach Cassesso himself and act as if he were going along with the plan. The defendant in the course of three conversations with Galvin confirmed the plan and added other details. Galvin was allowed to testify in Cassesso's trial for murder as to these conversations.

The First Circuit distinguished this situation from Massiah. They stated that while Massiah was overheard by prearrangement after his co-defendant had agreed to cooperate with the authorities in getting admissions in the case in chief, the defendant's statements in Grieco were primarily uttered in the commission of another substantive offense, subornation of perjury, and were only incidentally admissible in his trial on the pending indictment to show consciousness of guilt. The Court stated that the defendant's right to counsel was not violated. The Court also stated that the Supreme Court has established that the pendency of an indictment does not immunize a defendant from accountability for statements made in the commission of another crime, even though made to a government agent, in the absence of counsel. United States v. Hoffa, supra. The Court also noted that had the defendant made his proposals to his counsel, the attorney-client privilege probably would not have excluded his counsel's testimony to such conversations. The Court noted that the privilege generally does not extend to confidences concerning present and future criminal activity. The state would also direct the Court's attention to Commonwealth v. French, 259 N.E. 2d 195 and Deskin v. Commonwealth, 512 S.W. 2d 520.

When one compares the facts of the instant case to those present in Grieco, supra, the similarities are striking. In the present case Crawford's statements were uttered in the commission of another substantive offense, inciting to murder, and were only incidentally admissible in his trial on the pending indictment to show consciousness of guilt.

The purpose of the exclusionary rule is to prevent

the violation of a person's constitutional rights. This Court in Hoffa, supra, clearly ruled that obtaining information after indictment through a government agent equipped with listening devices did not violate Hoffa's rights and the evidence was admissible on the trial of his indictment for jury tempering. It would certainly violate the rationale and purpose of the exclusionary rule to hold that evidence offered at one trial was illegally obtained but that same evidence when offered at another trial was obtained without violating the defendant's rights.

In this case it was Crawford who hatched this death plot with no knowledge or encouragement from the State. It was Crawford who solicited the aid of other persons who revealed his misdeeds. The state merely responded to the information brought to its attention. In fact the state would have shirked its duty if it had not taken appropriate steps to confirm the existence and extent of the plot. Not to have taken such action could have endangered the life of the intended victim.

In this case the state did not plant Welch to try to find incriminating evidence on the defendant, nor did the state suggest through Welch the death plot in the hope that Crawford would get involved and thereby incriminate himself. To the contrary, it was Crawford who initiated the plot. He had prepared maps and notes in furtherance of that plot before he had talked to Welch. Further, he had previously tried to enlist others in that plot. The evidence shows the defendant was serious about having the witness killed. What the state did in this case is what is done or should be done in every case where it has information that a murder plot exists.

There is no evidence in this case that Welch did anything but go along with Crawford's plot. There is no evidence that Welch was asked to get any information concerning the case for which Crawford was indicted. In fact, all the testimony admitted clearly shows the only matter discussed was Crawford's plot to kill the witness.

The state submits that to hold the instant case is covered by Massiah, supra, would be a disservice to the integrity and rationale of the principles of that case, since it would condemn an otherwise exemplary procedure. The state further contends that the trial court correctly ruled this evidence was admissible to show consciousness of guilt.

IX.

PETITIONER'S CONFESSION WAS KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE.

The issue of the voluntariness of a confession made after Miranda warnings is one of the totality of the circumstances. This issue is to be resolved by the trial court. In the absence of an abuse of the trial court's discretion that judgment should not be disturbed on appeal. Hegman v. State, 280 So.2d 192, 50 Ala. App. 486.

The circumstances in this case more than justify the determination of the trial court that the defendant's statements were made of his own free will. The defendant was first warned of his rights at the hospital at 2:35 a.m. on October 7, 1977. (Tr. p. 424) He was asked if he understood those rights. As can be seen by the testimony of both Deputy Wood and Dr. Sugg the

defendant's wound was minor and he was in good condition. The defendant answered that he understood and executed a waiver of those rights. It was determined that he was a high school graduate and had completed one year of college. He was not threatened or offered any reward or inducement. A short time later he was taken to the County Jail. At approximately 3:20 a.m. he met with Investigator Joe Pitts in Mr. Pitts' office. No threats were made to him and he was not offered any inducement. Mr. Pitts reminded the defendant of the rights about which Mr. Wood warned him. Mr. Pitts asked him if he understood those rights. (Tr. p. 437) He also read to him from the rights form. The defendant was calm. (Tr. p. 442) The defendant's rights were gone over again. He was then questioned for approximately 18 minutes. The defendant gave a statement basically blaming the offense on someone else.

A 4:00 a.m. the defendant was brought down to see if a certain subject was his sister. He was again talked to briefly. The defendant gave a more elaborate statement still placing the blame on someone else. No one threatened him at that time or offered him any inducement. (Tr. p. 455) The defendant was not talked to again until Saturday afternoon, October 8, 1977. He was brought from his cell to be advised of the charges against him. After being so advised he expressed a willingness to talk. He was again advised of his rights and executed a waiver. (Tr. pp. 485, 486) He then gave a statement which was different from his previous statements. On Sunday, October 9, 1977, he was again warned of his rights and executed a waiver. The officers did not attempt to get a statement at that time but advised him of court procedures. They

also advised him that they would conduct a search for the gun on the following day. On Monday, October 10, 1977, the defendant asked the Sheriff and Lt. Pitts to talk to him. He then told them where to find the rifle used in this crime.

The defendant's statements made on October 7, 1977, were so brief and so close in point of time to practically constitute only one statement. Certainly additional warnings were not required. His statement of October 8, 1977, was preceded by warning. The statement he gave on October 10, 1977, was made at his request and after he had been warned of his rights repeatedly over several days. The time lapse between the statements was not great. As was held in Gibson v. State, 347 So.2d 576:

> Once the mandate of Miranda has been complied with at the threshold of questioning it is not necessary to repeat the warnings at the beginning of each successive interview.

In Gibson, the time lapse between interviews was an hour and a half. It should be noted that while the defendant was not warned of his rights on October 10, 1977, he was warned on several occasions including October 9, 1977, and the statement on the 10th was given at his request. Anderson v. State, 339 So.2d 166, held that a gap of one day did not require new warnings. In Johnson v. State, 324 So.2d 298, the Court held that a gap of three days did not require new warnings.

Contrary to the contention of the appellant, the evidence shows that he was not questioned continuously for several days. He was questioned briefly right after his arrest. Over a day later he was interviewed. Over a day after that he was interviewed at his own request. Further, the substance of the statements themselves reveals he was not pressured in any way.

There were no continuous interrogations of the defendant for extended periods of time by relay teams of investigators, not allowing any rest to the defendant as were present in Ashcroft v. Tennessee, 332 U.S. 143, relied on by the appellant. In addition the trial court had the benefit of listening to tape recordings of the defendant's statements in evaluating whether or not they were voluntarily made. The state submits that the evidence overwhelmingly supports the trial court's ruling that the defendant's statements were voluntary.

CONCLUSION

The judgment of the Alabama Supreme Court affirming the conviction and sentence of petitioner should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I did on this the 4th day of April, 1980, serve a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for the Petitioner by placing said copy in the U.S. Mail, postage prepaid and addressed as follows:

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